ART. VIII.—*Trial of Robert M. Goodwin, on an indictment of manslaughter, for killing James Stoughton, Esq. in Broadway, in the city of New York, &c. Taken in short hand by William Sampson, Counsellor at Law.* New York, pp. 195. 1820.

IN that part of criminal law, which may be denominated the penal code, the legislation of this country seems to have reached as near perfection, as the infirmities of human nature and human institutions will allow. The punishment of crimes is at least quite as mild as is consistent with the object of all punishment, and is graduated by a scale as accurate as the nature of the subject will admit. But that part of this law which relates to the definition of the offence, the process, the trial, the rules of evidence, and every thing which precedes the infliction of punishment, may perhaps still be considered as requiring the interference of a prudent reformer to simplify its details, to settle its principles and reduce them to a text, and purify it from many deformities, the growth of a barbarous age. Fortunately for us, the comparatively pure source, from which we have drawn our legal institutions, has transmitted to us none of those glaring abuses in the administration of penal law, which the eloquent pens of Beccaria and Voltaire exposed to the public eye during the last century, and too many of which have never yet been abolished, or have recently been revived on the European continent. That hateful system of torture, of secret trial, and of self-crimination, which rendered even the mind of a Pothier incapable of fulfilling the duties of a criminal judge, in the most enlightened age of French jurisprudence, when it was adorned by this accomplished lawyer, and by a D'Aguesseau and a Montesquieu, has ever been unknown to us and our ancestors. But it does not therefore follow, that this branch of the administration of justice is yet brought to that degree of perfection of which it is susceptible, in respect to the precision of its rules and the certainty of their application.

It is evident that the crime of homicide may involve various degrees of guilt, to which it would be unwise and unjust to apply the same term of reprobation and the same measure of punishment. From the slightest degree of culpable negligence, by which a human being is deprived of that existence which is the gift of his Creator, to the atrocious guilt of the assassin

and the poisoner, there are various shades of criminality, which require the application of different considerations in the judgment that may be formed of them by human tribunals. In all of them however it would seem, such is the infirmity of human judgment, that it must necessarily enter into the very idea and definition of the crime that the *corpus delicti* should not be wanting; that death should ensue the act by which it was intended to be consummated. Yet by the civil law it was the intent and not the event which constituted the essence of the crime. Thus by the Cornelian law *de Sicariis*, made by Sylla himself the greatest of murderers, in order to restrain the excesses produced by the bloody scenes of the civil wars in which he was the chief actor, 'Si quis hominem occiderit,—aut hominis occidendi vel furti cum telo ambulaverit, aut qui hominis necandi causa venenum confecerit,'—in all these cases the offender was punished capitally. This extreme severity was probably necessary to strike terror into the armed bands of robbers and assassins, who prowled over Italy in those ferocious times; but it was subsequently applied so as to confound all distinction between the intent to commit homicide and the actual consummation of the crime. 'Nihil enim interest an quis hominem occiderit, an ejus vitæ attentaverit quamvis non occidat.' So also by the old French law, if a person struck or wounded another, with intent to kill, the offender was punished capitally, in the same manner as if death had ensued. *Domat, Loix Civiles, tom.* ii. *p.* 209. *Denizart, tom.* i. *p.* 585.

The Roman law determined the criminality of an action by the intent and not the event, in those offences only, which were emphatically called *maleficia;* such as treason, assassination, parricide, poisoning, &c. In these cases, where the intent was clearly manifested by some overt act, it drew after it all the consequences of a capital crime, although not consummated by the death of the person against whom it was directed. 'Maleficiis voluntas spectatur, non exitus.' But in all other cases it adopted the safer rule of determining conjointly by the motive and the event of the action. *Bynkershoek, Observ. Jur. Rom.* iii. 10.

This rule of the civil law was once attempted to be applied in the tribunals of our own country, to supply a defect in their jurisdiction. By the act of Congress of 1790, for the punish-

ment of certain crimes against the United States, cognizance was given to certain courts of murder, &c. committed on the high seas, and in foreign ports and harbours. In the case of Mr. Gill, which will be found reported in Dallas' 4th volume of Reports, p. 426, the mortal blow was given in a foreign port on the water, and the person on whom it was inflicted died on shore. Of course, according to the common law definition of the crime, it was not consummated within the limits of the jurisdiction given to the court by the act of Congress. But as this jurisdiction was conferred as a part of the admiralty jurisdiction granted to the federal government by the constitution, and as the proceedings of the admiralty are, in general, regulated by the Civil or Roman law, in the absence of any statutory provision to the contrary, it was insisted by the counsel for the prosecution, that the offence was consummated, according to that law, within the limits of the jurisdiction of the court, as prescribed by the act of Congress. But this position was overruled by Judge Washington, who held that we could not escape from the silence of our own code by invoking that of the Civil law: and we were to look to the common law for the definition of the crime of murder, when made punishable, *eo nomine*, in an act of the legislature: not but that Congress had competent authority to provide for such a case; because having power to define and punish felonies committed on the high seas, they might declare that a mortal stroke given on the seas, of which the party died elsewhere, should be a capital felony. But that they had not in fact made provision for such a case.

It is stated in Mr. Christian's Notes to Blackstone's Commentaries, that the distinction of manslaughter from murder is not recognized by the Civil law. 'In the Civil law and the law of Scotland, the distinction doth not exist; and persons tried at the Admiralty Sessions, where the judges proceed according to the rules of the Civil law, must either be convicted of murder, or acquitted.' As to the law of Scotland, it is true that by a modern statute, the distinction is taken away. But it is equally true that by the old law of Scotland, which is principally derived from the Civil law, it was clearly laid down. 'The distinction,' says Erskine, 'which obtained in our ancient law, between slaughter premeditated, or upon *forethought felony*, and that which was committed on a *sudden ty*, or *chaud mella*, indulging to the last the privilege of

girth and sanctuary, was taken off by 1661, c. 22, (copied often 1649, c. 19,) which supposes homicide to be a capital crime without any such distinction.' *Erskine's Institutes of the Law of Scotland, lib.* 4. *t.* iv. *s.* 19. And as to the practice of the Admiralty, Sir Leoline Jenkins, in his charge to the jury at the Admiralty Sessions at the Old Bailey, in 1668, lays down the law of homicide with the usual distinctions of murder and manslaughter, not even intimating that there was any difference in this respect between the common law of England and the Civil law, as administered in the Court of Admiralty. *Sir L. Jenkins' Works, vol.* i. *p.* xciii. The only express text of the Pandects on this subject: '*Leniendam pœnam ejus qui in rixâ causa magis quàm voluntate homicidium admisit.*' *Dig. lib.* 48, *t.* viii. *s.* 1. Dr. Brown understands as indicating a distinction similar to that known to our law. *Brown's Civ. and Adm. Law, vol.* i. *p.* 422. But this may posssibly be supposed to exclude the idea of an intention to kill, since the case put by Marianus is not of the use of a deadly weapon, but of an ordinary implement, '*clavis aut cucuma*;' and Huberus informs us that in the practice of his country, which professed to be founded upon the Roman law, homicide committed in a sudden affray, with a deadly weapon, was punished capitally in the same manner with premeditated murder. And he says that those who contended for a contrary interpretation were compelled to resort to a new reading different from that of the Florentine MS. substituting for the words: 'Sed si clavi percussit aut cucuma in rixa, quamvis ferro percusserit, leniendam pœnam ejus,' &c. these, 'Sed si clavi percusserit aut cucuma, aut ferro in rixa, quamvis percusserit:' thus extending the mitigation of the offence, when committed in a sudden affray, to cases where it was committed with a deadly weapon. But Huberus remarks upon this bold attempt: 'Sed maneat laus ingenii, salva ratione et auctoritate juris: quæ hoc loco plane dictat, τὸ ἀκίνητον ἄμεινον, nihil esse causæ turbandi limpidam.' *Huberus, Prœlaeciones, tom.* iii. *pp.* 1533, 1534. The old French law, which it is well known was built mainly upon the Roman law in criminal matters, (and in the *pays du droit écrit*, entirely, as to civil cases also,) mitigated the offence of homicide, wherever it was committed under those circumstances in which our law would consider it as manslaughter, if it was attended with these favourable cir-

cumstances, viz. if he who killed was first attacked; if he did not use deadly weapons; and if he did not strike, or attempt to strike at those parts of the body where wounds are mortal. *Domat, Loix Civiles, tom.* ii. *p.* 209. And the new penal code of France, although it does not in terms speak of any intermediate shade of offence between murder, which it defines to be homicide voluntarily committed, and justifiable or excusable homicide; merely designating the more odious species of murder by the terms *assassinat, parricide, infanticide, empoisonnement,* &c. yet as it punishes only these last with death, and every other case of voluntary homicide, with imprisonment, and hard labour for life, except 'lorsqu'il aura précédé, accompagné ou suivi un autre crime ou délit.' under which circumstances it is capital; this code may be considered as substantially analogous to our own law, and to what may be considered as the concurrent voice of reason and the common consent of nations in almost every age, which have thought some allowance was due to the infirmity of human passions in this respect. *Code Penal, l.* 3, *t.* ii. *c.* 1, *s.* 1. 'Quant au meurtre dénué de toute espéce de circonstances aggravantes, il sera puni de la peine qui suit immédiatement celle de mort, c'est-à-dire de la peine des travaux forcés à perpétuité. Dès que ce crime n'est point le résultat d'un dessein formé avant l'action, dès qu'il ne présente aucun des caractères dont nous avons parlé, il est sans contredit moins grave que l'assassinat, et dès lors ne doit pas emporter la même peine; autrement cette juste proportion qu'on ne saurait observer avec trop de soin entre les délits et les peines, et cette gradation qui en est la suite nécessaire, ne subsisteraient pas.' *Exposé des Motifs du Code Penal.*

In other respects, the civil law contains similar provisions with our own as to excusable and justifiable homicide. Thus it is excusable by both codes when committed in self defence; but under what circumstances depends upon a vast variety of considerations. The casuists, among the Jesuits, relaxed this principle so far as to excuse, or rather to justify, homicide committed in defence of one's honour, or good name, or of the minutest article of property, or against the most trifling personal injury. Their abominable maxims are exposed with admirable ability by Pascal in his *Lettres Provinciales,* the fourteenth number of which D'Aguesseau compares for

eloquence with the Phillipics of Demosthenes and Cicero.* 'Ecoutons donc le langage de votre Ecole, et demandons à vos Auteurs: Quand on nous donne un soufflet, doit-on l'endurer plutôt que de tuer celui qui le veut donner; ou bien, est-il permis de tuer pour éviter cet affront? *Il est permis,* disent Lessius, Molina, Escobar, Reginaldus, Filiutius, Baldellus, et autres Jésuites, *de tuer celui qui nous veut donner un soufflet.* Est-ce-la le langage de Jesus-Christ? Repondez nous encore. Seroit-on sans honneur en souffrant un soufflet, sans tuer celui qui l'a donné? *N'est il pas veritable,* dit Escobar, *que tandis, qu'un homme laisse vivre celui qui lui a donné un soufflet, il demeure sans honneur?* Oui, mes peres, *sans cet honneur* que le diable a transmit de son esprit superbe en celui de ses superbes enfants. C'est cet honneur qui a toujours été l'idole des hommes possédés par l'esprit du monde. C'est pour se conserver cette gloire, dont le démon est le veritable distributeur, qu'ils lui sacrifient leur vie par la fureur des duels à laquelle ils s'abandonnent, leur honneur, par l'ignominie des supplices auxquels ils s'exposent, et leur salut,' etc. *Lettres Provinciales, No.* 14.

But we must advert to the work before us. It contains a most laborious, faithful, and instructive account of a very interesting criminal case. It is not a mere popular narrative intended to gratify the vulgar love of the marvellous and the horrid; but is such a report of a celebrated cause as will satisfy professional readers, whilst it gratifies the natural curiosity of the public respecting such transactions. All the procedure is minutely detailed, and we are informed that the speeches of the counsel are taken down with verbal accuracy, which indeed we might presume would be the fact, from the known reputation of Mr. Sampson as a short-hand writer and his experience in criminal law. It appears to us that this species of literary labour is rather undervalued. We do not mean that the exertions of the learned reporters, who record the debates and decisions on matters of law in the supreme courts of justice, are not adequately appreciated, but that too low an estimate is apt to be formed of the qualifications necessary to give a faithful narrative of the more

* 'La quatorzieme Lettre sur tout est un chef-d'œuvre d'Eloquence qui peut le disputer à tout ce que l'Antiquité a le plus admiré, et je doute que les Phillipiques de Démosthène et de Cicéron offrent rien de plus fort et de plus parfait.' *Œuvres de D'Agueseau,* tom. i. p. 407.

dramatic incidents which occur in an interesting trial before a jury. It requires considerable technical knowledge to execute this task with ability. Such works too are always useful, and often more instructive than general history; and sometimes rival the most ingenious fictions, in the interest and animation of their details. They illustrate the history and manners of the age more clearly than many works of greater pretention. The subjects of some of the best novels have been taken from the *Causes Celébres;* and who is there ever so little versed in Scotch law that does not read with lively interest the accounts of those state trials, from which the greatest novellist of the present day has worked up some of his finest narratives?

In the present case, which was a trial for manslaughter in killing a counsellor at law in a public street of the city of New York, in December last, during an affray between him and the prisoner, which originated in a quarrel between them, on account of some proceedings in a law suit commenced by the counsellor against the prisoner; some of the most important legal questions which can arise in a case of homicide were discussed by the court and bar, with great learning, eloquence, and ability. The result was that the jury, not having agreed on a verdict, was discharged; and the question is now pending before the Supreme Court of New York, whether the individual can be again put on his trial for the same offence. A preliminary point was first debated, whether the prisoner was entitled to be bailed or not; which was decided against the application by Mr. Colden, the Mayor of the city of New York, and afterwards determined favourbly by Mr. Chief Justice Spencer. The former application was made previous to the trial, the latter after the jury had been discharged, and the case continued to another term of the court. As the opinions delivered by the two judges upon this occasion appear to us to afford a favourable specimen of judicial talents and learning, we take the liberty of making the following extracts.

'It seems to be admitted,' says the Mayor, 'that where a person is charged with any felony above the degree of petit larceny, as to which there is a statutory provision, he cannot demand bail as a course, and that the court or magistrates, having the power, are to bail him or not at their discretion.

'Legal discretion never means, either in criminal or civil law, arbitrary will.

'Legal discretion is always to be governed or directed by known and established rules, and in truth cannot be otherwise applied than to decide whether facts bring the case within the operation of such rules.

'The well established rule of law applicable in this case is, that a person fully and explictly charged with a felony cannot be bailed, unless there be something presented in opposition to the charge which may raise a presumption in favour of his innocence; or at least it must appear indifferent to the court or magistrate called on to bail him, whether he be guilty or not.

'It is unnecessary to recapitulate the authorities which have been cited to this effect. It has been the law of England and of this country since the time of the statutes of Edward the First. No case has been cited to the contrary. And I never knew of any practice of this court, or any other, that violated a rule, the strict observance of which appears to me to be absolutely necessary to a due and impartial administration of law; of that administration which shall put the poor and the rich on an equal footing in a court of justice.

'This rule is not disputed by the counsel for the prisoner: they contend, however, that the maxim of law that every man is to be presumed innocent till he be found guilty, applies to this case at this time. But it is obvious that this argument would lead us too far—for if it would now apply, it would at all times reach every case. And if it is always to be adopted, then it would follow that in every case the accused must be let to bail. The truth is, that this just and benign principle is not applicable, except when the accused is on his trial: for the purposes of securing his person to answer to a direct and positive charge, made in due form, and to bring him to that trial, we are bound to treat him as if he were guilty: at least we must do so until some matter be presented in his favour, which in the exercise of our discretion we shall judge a presumption of his innocence.

'In this case nothing of that nature is offered. The prisoner is not only committed on a charge of felony fully and explicitly expressed in the warrant of commitment, but he stands charged with a felony of manslaughter, by the indictment on the files of this court.

'It appears to me in vain to say that the public prosecutor is to produce further evidence of the guilt of the accused, than the commitment or indictment, since the law says that he must raise a presumption in favour of his own innocence. It can only mean

that he must destroy the presumptions which must necessarily arise against him from these accusatory documents.

'In some instances indeed the magistrate or court may look into the testimony on which the accusation is founded; and if it affords the presumption in favour of the prisoner's innocence, he may be bailed.

'A second ground however of this application is, that the trial of the prisoner on the indictment for manslaughter has been so long delayed that he is entitled to be bailed, if not discharged.' &c.

Mr. Chief Justice Spencer says,

'Manslaughter is a felony, and it is punishable, on conviction, by imprisonment in the state prison for a term not less than three years, nor more than fourteen years. And it has been argued, that it being a felony thus punishable, it is a case in which the party accused ought not to be bailed, unless it be shown that there is a strong presumption of innocence. I am satisfied that the prisoner cannot demand it as a matter of right, to be admitted to bail, and that it is a question resting in the sound legal discretion of the judge awarding the writ.

'*Hawkins*, b. 2d, ch. 15. § 40 and 80, lays down the law to be, that if it stands indifferent whether a person charged with a felony is guilty or not, he ought to be bailed; and that even in capital cases, where there is any circumstance to induce the court to suppose he may be innocent, they will bail—and that the judges will in general exercise the power of bailing in favour of a prisoner in every case not capital, though they will not exercise it when the prisoner is notoriously guilty, by his own confession or otherwise, without the existence of some special causes to induce it.

'There are several cases in which persons charged with manslaughter have been bailed, where there has been no presumption of innocence. Thus in *Rex* v. *Dalton*, (2 *Str.* 911) the defendant was committed on a coroner's inquest for manslaughter, and was brought before Lord Raymond, chief justice, on *habeas corpus*, at his chambers. He held that if the depositions show that the offence was murder, he would not bail; but if it amounted only to manslaughter, he would bail; and he bailed the prisoner. So also in *Rex* v. *Magrath*, 2 *Str.* 1242, the defendant was committed for manslaughter, and it appearing to be no more, upon the depositions taken before the coroner, the Court of King's Bench admitted him to bail. In Lord *Mohun*'s case, which was before Lord *Holt*, at Chambers, (1 *Salk.* 104) he held, that if a man be found guilty of murder by the coroner's inquest, he is sometimes bailed, because the coroner proceeds upon depositions taken in writing,

which may be looked into; otherwise, if a man be found guilty of murder by a grand jury, then the court cannot take notice of their evidence, which they are bound to conceal; and it appears by the cases before cited from *Strange*, that Lord Mohun was bailed first by *Holt*, and afterwards by the *Lords*, after an indictment for murder.

'In some later cases, bail has been refused when the offence was a felony, punishable with transportation; as in 2d *D.* & *E.* 77, and 3d *East*, 157, and there is therefore no fixed or certain rule in cases of felony, each particular case depending on its peculiar circumstances. The object and end of imprisonment before trial and conviction, is to secure the forthcoming of a person charged with the commission of a crime; and it is never intended as any part of the punishment; for until the guilt of the party be legally ascertained, there is no ground for punishment, and it would be cruel and unjust to inflict it. The laws of every free government estimate personal liberty as of the most sacred character, and it ought not to be violated or abridged before trial; but in cases where there are strong presumptions of guilt, and although the nature and kind of punishment which awaits those whose guilt is legally established, does not alter the turpitude of the offence, it must enter into the consideration of the question of bail; for if the punishment would be a pecuniary infliction, then bail in more than the amount of the probable fine, answers every purpose: if the punishment be death or corporal imprisonment, a consciousness of guilt would probably induce to flight, and an evasion of the punishment; and in admitting to bail, therefore, regard must be had to the probable guilt of the party, and the nature of the punishment denounced.

'It appears to me, that from the facts before me, the conclusion is inevitable, that it is quite doubtful whether the prisoner is guilty; and I think it stands indifferent whether he is so or not. After a long and laborious trial, the jury have not been able to agree, and what proportion of them were for convicting, and what for acquitting, has not been shown. No inference can be drawn from the fact that the foreman pronounced a verdict which was dissented from by the third juror, that all the other jurors were for convicting the prisoner; and it may well be that a bare majority of the jury agreed to the verdict as announced by the foreman; and I perceive that all the jurors viewed the case as of a mitigated character, by their recommendation of the prisoner to mercy. I must presume that the jurors were impartial, and that their final disagreement proceeded from a conscientious difference in opinion as to the prisoner's guilt; and I am therefore bound to conclude, that the prisoner may be innocent of the offence. In

such a case, as I understand the law, he is entitled to be bailed, if he can give it in an amount, and by persons of sufficient ability, affording a reasonable expectation, from the impending forfeiture of the recognizance, that he will appear and stand trial.'

We had intended to examine the legal doctrines discussed in the course of the trial, because it appears to us that there is, in general, a prevailing tendency in this country to relax the wholesome principles of the law of homicide, and to give too much indulgence to the licentiousness of human passions. Our law, when soundly interpreted, is sufficiently mild in this respect. Nor was it the fault of the court, if it was not duly executed in the present instance; for it seems to us that the principles of law laid down in the charge to the jury as applicable to manslaughter in general are perfectly correct, and such as the peace of society requires should be asserted and enforced in the administration of justice. How far they ought to have contributed to the conviction of the prisoner in the present case we pretend not to judge; but the legal doctrines expounded by the court are the only doctrines on the subject which can be reconciled with the law of nature, or with what is, or ought to be, the municipal code. We forbear, however, for the present, from any further discussion of the subject.

ART. IX.—*Notices sur le caractère et les écrits de Madame la Baronne de Staël Holstein, par Madame Necker.* Paris, 8vo. 1819.

IT is difficult to appreciate fairly an author or a book that has been much praised. With most readers public opinion is omnipotent; they are sure to admire whatever book is in fashion, not only because it is troublesome to reflect and form an opinion for oneself, but because the popularity of a work actually makes it of more value, as it adds to its power of arresting their attention. A book, which every one is reading and admiring, for that very reason excites more hope and expectation, and is read with more interest and pleasure, than one which wants this adventitious aid. Another class of readers; they whose opinion is uttered less loudly, but is sure in the end to be heard more distinctly, and is spread wider and lives longer; they whom much learning has made